# Taking Politics Religiously: Can Free Exercise and Establishment Clause Cases Illuminate the Law of Democracy?

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## INTRODUCTION

Thirty-six years ago, then-Professor Robert Bork delivered a now-notorious Harris Lecture here at Indiana University. Later published as *Neutral Principles and Some First Amendment Problems*,[1] it may be one of the most significant pieces of legal scholarship ever written—not just because of its intrinsic interest and influence on subsequent constitutional theory, but because of its categorical declaration that "[c]onstitutional protection should be accorded only to speech that is explicitily [sic] political."[2] Its stinging attack on such signature cases of the Warren Court as *Griswold v. Connecticut*[3] played a large part in galvanizing the successful opposition to later-Judge Bork's nomination to the Supreme Court.

The Reapportionment Cases were a target of Professor Bork's particular wrath. As you will remember, these cases announced that the Equal Protection Clause of the Fourteenth Amendment required state legislative districts to comply with the principle of one person, one vote. "Chief Justice Warren's opinions in this series of cases," Professor Bork declared, "are remarkable for their inability to muster a single respectable supporting argument."[4] Professor Bork claimed that this failure was inevitable given the Court's claim that "the Constitution ha[d] made a value choice about individuals"—namely, that all individuals were entitled to cast equally weighted

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As with so much else in my work, the seeds of the argument here were planted by my longtime colleague and inspiration, Jim Blacksher. His article, *Majority Black Districts, Kiryas Joel, and Other Challenges to American Nationalism*, 26 CUMB. L. REV. 407 (1996), prompted me to start thinking about the relationship between voting rights and religion cases. Over the ensuing decade, the argument has benefited from a series of discussions with Viola Canales, Sam Issacharoff, Nate Persily, Rick Pildes, Jane Schacter, and Kathleen Sullivan. I have also presented versions of this argument at workshops, lectures, or colloquia at the law schools of Emory, Northwestern, the University of Connecticut, the University of North Carolina, the University of Texas, the University of Michigan, and Yale; each time, I received bracing criticism, helpful suggestions, and great encouragement. I particularly appreciate the comments I received from Mitch Berman, Jack Boger, Heather Gerken, Mark Greenberg, Don Herzog, Dawn Johnsen, Bill Marshall, Richard Primus, David Rabban, Bob Weisberg, and the students at Michigan, Texas, and Yale.

1. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

2. *Id.* at 20.

3. 381 U.S. 479 (1965) (striking down Connecticut's ban on the use of contraceptives by married couples).

4. Bork, *supra* note 1, at 18.

votes—rather than "deriv[ing voting] rights from governmental processes established by the Constitution."[5]

That latter tack would have involved adjudicating the Reapportionment Cases not under the Equal Protection Clause but under the Guarantee Clause, which states that "the United States shall guarantee to every State in the Union a Republican Form of Government."[6] That clause, Professor Bork argued, does not impose a rigid requirement of individual equality but could be read to prohibit using apportionments that "permit the systematic frustration of the will of a majority of the electorate."[7] In Professor Bork's view, the "requirements of a democratic process rather than . . . the rights of individuals" should serve as the sole constitutional constraint on states' allocation of political power.[8]

Now, I think Professor Bork was wrong in claiming that the Constitution expresses no "value choices" about political equality. The historical progression of constitutional amendments regarding the right to vote does just that.[9] The Fifteenth Amendment prohibited denial or abridgement of the right on account of race; the Nineteenth, on account of sex; the Twenty-fourth, on account of failure to pay any poll tax (at least with respect to federal elections); and the Twenty-sixth, on account of age (at least for citizens over the age of eighteen). Each expanded the franchise to include groups previously thought unworthy or incapable of engaging in responsible self-government: blacks, women, poor people, and young adults. Together, they express a commitment to political equality and equal dignity among citizens.

But Professor Bork was on to something in identifying the problem of approaching structural problems through entirely individualistic solutions. Politics implicates a broad range of constitutional values—from individual dignity to protection of minority and dissenting viewpoints to recognizing the claims of voluntary associations to preserving channels for change to avoiding capture of the state machinery by a single faction. So if we look to the constitutional structure to give us guidance in resolving thorny questions of political design—there's a reason Justice Frankfurter's image of the "political thicket"[10] has had such staying power—perhaps we need to look beyond the Equal Protection Clause, and perhaps even beyond the clauses that explicitly treat political design altogether.

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5. *Id.* at 17.

6. U.S. CONST. art. IV, § 4. For a more elaborate version of the argument that the Court should have used the Guarantee Clause, see Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL'Y 103 (2000).

7. Bork, *supra* note 1, at 19 (quoting Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713, 753–54 (1964) (Stewart, J., dissenting)).

8. *Id.*

9. And the obscure and underenforced Reduction-of-Representation Clause in § 2 of the Fourteenth Amendment involves the very sort of "sixth-grade arithmetic" that Justice Stewart later caustically criticized one person, one vote for adopting in *Avery v. Midland County*, 390 U.S. 474, 510 (1968) (Stewart, J., dissenting) (arguing that "the apportionment of the legislative body of a sovereign State, no less than the apportionment of a county government, is far too subtle and complicated a business to be resolved as a matter of constitutional law in terms of sixth-grade arithmetic").

10. Colegrove v. Green, 328 U.S. 549, 556 (1946).

One of the key sentences in *Reynolds v. Sims*[11] provides a possible point of departure. "The right of suffrage," the Court explained, "can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."[12] Free exercise. The phrase, of course, appears in the First Amendment of the Constitution. But it appears as part of a *pair* of clauses: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[13] Taken together, the religion clauses express a rich view of the appropriate role of religion in political society.

Thirty years ago, in another landmark case in the law of politics, *Buckley v. Valeo*,[14] the Supreme Court tersely rejected the suggestion that the religion clauses could provide a helpful analogy for resolving questions of political design as "patently inapplicable."[15] One might doubt, as Don Herzog remarked when I presented a version of this essay at the University of Michigan's Constitutional Law Workshop, that we can gain much traction from using one often inconsistent, incoherent area of law (the religion cases) to illuminate another often inconsistent, incoherent area (the politics cases). But I think comparing the two lines of cases constitutes a useful thought experiment that rests on a historically plausible connection between the two arenas.[16] And so I argue that the analogy between cases under the religion clauses and cases involving the law of democracy—and the places where the analogy breaks down—can sharpen our understanding, particularly about how constitutional law deals with the relationship among individuals, intermediary associations, and the state. To be sure, seeing these connections does not provide a new, unified theory for adjudicating all cases involving political arrangements. Rather, it simply provides a series of possibly useful new lenses for thinking about some difficult problems.

Part I of this essay briefly identifies some key values underlying the religion clauses: preventing state interference with individuals' choices about values, avoiding the creation of an outsider class, and preventing capture and exploitation of the machinery of government. I suggest that, at a relatively high level of generality, these values underlie many of the key doctrines in the law of politics as well.

The remaining parts take up several issues in the law of democracy. Part II looks at some issues regarding government regulation of political parties. Political parties adopt a variety of rules regarding who can participate in their affairs as voters, as candidates, or as party officials. One central question in the law of politics involves the extent to which the First Amendment bars government intervention in a party's internal affairs.

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11. 377 U.S. 533 (1964).

12. *Id.* at 555. For demonstrations of the Court's reliance on this formulation, see, for example, *Purcell v. Gonzalez*, 127 S. Ct. 5, 7 (2006) (per curiam); *Bush v. Gore*, 531 U.S. 98, 105 (2000) (per curiam); *Perkins v. Matthews*, 400 U.S. 379, 388 (1971).

13. U.S. CONST. amend. I.

14. 424 U.S. 1 (1976) (per curiam).

15. *Id.* at 92.

16. For example, Philip Hamburger and Bernadette Meyler have each shown ways that the concept of equal protection central to the Fourteenth Amendment and to many doctrines in the law of democracy and the commitment to religious liberty that underlies the First Amendment have informed one another. Philip A. Hamburger, *Equality and Diversity: The Eighteenth-Century Debate About Equal Protection and Equal Civil Rights*, 1992 SUP. CT. REV. 295; Bernadette Meyler, *The Equal Protection of Free Exercise: Two Approaches and Their History*, 47 B.C. L. REV. 275 (2006).

This in turn can raise a more fundamental question: who *is* the party? I suggest that some useful insight can be drawn from the Supreme Court's discussion of when government can intervene in the internal affairs of a church. Here, the Court has drawn a useful distinction between questions of doctrine, as to which government intervention is entirely inappropriate, and questions that involve a church's invocation of state power or benefits, which may be appropriate for judicial resolution.

Part III considers problems of legislative districting. Over the past fifteen years, the Supreme Court has repeatedly confronted the questions of when race-conscious or partisan redistricting goes beyond constitutional limits. Here, the Court's cases have pointed in different directions. While the Court has been quite worried about the potential "establishment" of race, it has essentially abdicated any responsibility for policing the "establishment" of parties, and has failed to see ways in which its districting jurisprudence fails requirements of neutrality.

Finally, Part IV returns briefly to the problem at issue in *Buckley v. Valeo*[17] itself: public funding of political campaigns. Here, a central question is the extent to which funding regimes simply benefit the parties whose legislators craft the financing programs in the first place. I suggest that public financing programs can pose an establishment-style threat, and that the religion-clause cases suggest one possible solution: constructing such programs so that private choices, rather than government decisions, determine how funds are allocated.

## I. THE COMBINED MESSAGE OF THE RELIGION CLAUSES

The relationship between the Free Exercise and Establishment Clauses has spawned voluminous case law and scholarly literature. Much of this law and literature focuses either on the "internal tension" between the two clauses,[18] or on whether there is "'play in the joints' between them."[19] While in particular cases the clauses might be reconciled or chosen between on a variety of bases, it is possible to discern several key values that underlie both.[20]

First, both the Free Exercise and the Establishment Clauses reflect a commitment to individual free choice in the selection of values and an opposition to government indoctrination. The clauses "embody an idea that was once considered radical: Free people are entitled to free and diverse thoughts, which government ought neither to constrain nor to direct."[21] To be sure, there is a two-way relationship between those thoughts and government action: individuals' values often inform their political choices, and the government policies that political activity produces can in turn influence individuals' thoughts. Consider, for example, the way in which religious

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17. 424 U.S. 1 (1976) (per curiam).

18. *E.g.*, Tilton v. Richardson, 403 U.S. 672, 677 (1971).

19. Locke v. Davey, 540 U.S. 712, 718 (2004) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970)).

20. I am particularly indebted to David Rabban's suggestions for how to formulate these key values.

21. McCreary County v. ACLU, 545 U.S. 844, 881–82 (2005) (O'Connor, J., concurring) ("By enforcing the Clauses, we have kept religion a matter for the individual conscience, not for the prosecutor or bureaucrat."); *see also*, *e.g.*, Wallace v. Jaffree, 472 U.S. 38, 50 (1985) (identifying "the individual's freedom of conscience as the central liberty that unifies the various Clauses in the First Amendment").

faith influenced many participants in the civil rights movement, which achieved a series of antidiscrimination laws that conveyed a powerful message regarding norms of racial justice that no doubt changed some hearts and minds. At the very least, however, the clauses reflect a commitment to the *fluidity* of such value formation: the government cannot freeze certain values into place and compel individual adherence to them.

Second, the religion clauses together reflect a view that the state should not be in the business of creating outsiders who are "not full members of the political community."[22] Thus, the clauses

> not only . . . protect the integrity of individual conscience in religious matters, but . . . guard against the civic divisiveness that follows when the Government weighs in on one side of religious debate; nothing does a better job of roiling society, a point that needed no explanation to the descendants of English Puritans and Cavaliers (or Massachusetts Puritans and Baptists).[23]

Imposing burdens or denying or conveying government benefits because of an individual's religion sends a powerful message regarding his status as a full citizen.

Finally, although this point emerges more clearly from the Establishment Clause jurisprudence, the clauses reflect a view that sectarian groups should be prevented from using state resources to benefit themselves and thereby enhance their competitive position. A religion should gain adherents based on its intrinsic merits rather than through the creation of state-subsidized incentives.

These general commitments inform the American law of politics as well. The First Amendment's protections of free speech and freedom of association are designed, among other things, to protect individual autonomy in the formation of political values. More concretely, just as the First Amendment prohibits inquiring into whether particular religious beliefs are "acceptable, logical, consistent, or comprehensible,"[24] so too the amendment protects "the sanctity of individual choice in the electoral context"[25]: it prohibits the state from inquiring into the motives behind a voter's decision to cast his or her ballot in a particular way.[26] Here, too, individuals' value choices are not completely independent of state action: we use elections to tally up our preferences and to determine the future direction and structure of our government, but existing arrangements powerfully influence our preferences and dramatically limit the choices available to us.[27]

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22. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 309 (2000) (quoting Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)).

23. *McCreary County*, 545 U.S. at 876 (internal citations omitted).

24. Thomas v. Review Bd., 450 U.S. 707, 714 (1981).

25. Lawrence G. Sager, *Insular Majorities Unabated:* Warth v. Seldin *and* City of Eastlake v. Forest City Enterprises, Inc., 91 HARV. L. REV. 1373, 1421 (1978).

26. *See, e.g.*, Kirksey v. City of Jackson, 663 F.2d 659, 662 (5th Cir. 1981); S. Alameda Spanish Speaking Org. v. City of Union City, 424 F.2d 291, 295 (9th Cir. 1970).

27. *See* Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1734 (1999) ("[Political] structures, which we often take for granted, powerfully shape our sense of the politically possible and what the baseline for a purer politics should be. Indeed, . . . our conception of what politics is shapes our views of how politics should be regulated, but how politics *has* been regulated shapes our conception of what

A variety of other doctrines in the law of democracy are designed to prevent the creation of permanent political outsiders. The one group of American citizens who continue to face significant formal disenfranchisement[28] are persons convicted of various crimes, and part of the very justification for this practice is the way it designates them as outsiders.[29] Otherwise, "'[f]encing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible."[30] The requirement of decennial reapportionment—a byproduct of the one person, one vote cases—at least forces the periodic reconsideration of existing allocations of political power. Requirements for periodic elections themselves are designed to prevent the phenomenon of "one man, one vote, one time."[31] And the second and third prongs of *Carolene Products* footnote four[32] seem to parallel the Religion Clause's concerns both with the creation of outsiders and with capture and exploitation of the machinery of the state to enhance a group's position in civil society. They authorize judicial intervention when the challenged legislation either "restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation" or is "directed . . . against discrete and insular minorities" as to whom "prejudice . . . may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."[33]

## II. ORTHODOX BISHOPS AND REFORM REPUBLICANS

One central group of politics cases involves the question of who can participate in a party's affairs. This question is complicated because political parties simultaneously play two roles in the democratic ecosystem. On the one hand, parties are voluntary associations whose members coalesce around a series of ideas about how government should run and seek to gain power to implement those ideas. Parties, in this sense, exist to shape the state. On the other hand, at least since the mid-nineteenth century and the advent of government-supplied ballots—and even more so since the early

politics can be. It's reminiscent of M.C. Escher's famous drawing of two hands drawing each other." (emphasis in original)).

Not only can political structures shape individuals' choices, they can also impede them directly. *See*, *e.g.*, Burdick v. Takushi, 504 U.S. 428 (1992) (upholding the constitutionality of Hawaii's ban on casting votes for write-in candidates).

28. Many citizens continue to face significant practical barriers to full and effective political participation, ranging from restrictive registration practices to lack of access to polling places to the use of electoral arrangements that dilute their votes. *See generally* SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS (3d ed. 2007).

29. Indeed, the decision to disenfranchise citizens who have violated the criminal law is precisely designed to designate them as outsiders. *See, e.g.*, Christopher Uggen & Jeff Manza, *Voting and Subsequent Crime and Arrest: Evidence from a Community Sample*, 36 COLUM. HUM. RTS. L. REV. 193, 212 (2004); ISSACHAROFF ET AL., *supra* note 28, at 33–34 (providing a bibliography of the extensive recent scholarship on offender disenfranchisement).

30. Carrington v. Rash, 380 U.S. 89, 94 (1965).

31. Samuel Issacharoff, *Fragile Democracies*, 120 HARV. L. REV. 1405, 1465 (2007).

32. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

33. *Id.* For a discussion of the relationship between these two prongs and problems of vote dilution and gerrymandering, see Pamela S. Karlan, *John Hart Ely and the Problem of Gerrymandering: The Lion in Winter*, 114 YALE L.J. 1329 (2005).

twentieth century, when many states required candidate nomination through government-regulated primary elections—parties have been important cogs in the governmental election machinery that serve a public function. And of course the process is even more circular than this, for the parties-in-government, to borrow V.O. Key's taxonomy, set the rules that the parties-in-the-electorate must play by.[34]

The question whether parties can exclude citizens from joining in their activities has a long pedigree, stretching back to the White Primary Cases.[35] But rather than rehash the now-happily resolved question whether a party can exclude voters on the basis of race, let me turn to some more recent examples that pose a less clear-cut version.

The Republican Party of Texas holds an annual convention at which various groups operate exhibition booths.[36] In 1996, the Log Cabin Republicans of Texas, a group of Republicans who support civil rights for gay men and lesbians, applied to run a booth.[37] After initially permitting the group to participate, the party's executive director ultimately rejected the Log Cabin Republicans' application, apparently because of the party's disapproval of the group's message.[38] The Log Cabin Republicans brought a constitutional challenge (under Texas constitutional provisions that mirror the First Amendment, the Equal Protection Clause, and the Due Process Clause) to their exclusion from the party's platform-crafting process.[39]

Also in 1996, the citizens of California adopted by initiative a statute providing for a blanket primary.[40] Voters were no longer required to register as members of a political party in order to participate in that party's primary; instead, voters received a ballot listing all the candidates seeking nomination for a particular office.[41] A voter could cast her vote for whichever individual candidate she preferred in each race; in effect, the voter could participate in every party's primary, albeit for different offices, by voting for a Republican candidate for governor, a Democratic candidate for state assembly, and a Peace and Freedom Party candidate for Board of Equalization.[42] The candidate for each party who received the most votes cast for that office would be denominated the party's standard-bearer in the general election.[43] The initiative's drafters promoted it as a measure to "'weaken' party 'hard-liners' and ease the way for 'moderate problem-solvers'"[44] by creating primary electorates that were more representative of the population at large. The California Democratic, Republican,

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34. *See generally* ISSACHAROFF ET AL., *supra* note 28, at 202–325.

35. Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944); Nixon v. Condon, 286 U.S. 73 (1932); Nixon v. Herndon, 273 U.S. 536 (1927).

36. *See* Republican Party v. Dietz, 940 S.W.2d 86 (Tex. 1997) (describing the events at issue).

37. *Id.* at 87.

38. *Id.* at 88.

39. *Id.*

40. *See* Cal. Democratic Party v. Jones, 530 U.S. 567 (2000) (describing the California statute).

41. *Id.* at 570.

42. *Id.*

43. *Id.*

44. *Id.*

Libertarian, and Peace and Freedom Parties brought a constitutional challenge to the inclusion of non-party members in their nominating processes.[45]

Finally, consider the example of David Duke.[46] Duke, a controversial political figure with a long history of white supremacist activity, sought the Republican Party's presidential nomination in 1992.[47] Pursuant to Georgia law, Max Cleland, a Democrat who was then Georgia's Secretary of State, published a list of potential candidates to appear on the ballot for the state's preferential primary election and Duke's name appeared on that list as a Republican candidate.[48] But pursuant to power given to them under Georgia law, the Republican members of the presidential candidate selection committee—the state party chairman and the state senate and house minority leaders—struck Duke's name from the list.[49] Duke and registered Republican voters who supported his candidacy sued.[50]

In the end, the Texas Supreme Court upheld the exclusion of the Log Cabin Republicans from the Texas state Republican convention,[51] the United States Supreme Court struck down the inclusion of unaffiliated voters in California's primaries,[52] and the Eleventh Circuit upheld the exclusion of David Duke from the Republican primary ballot.[53] One way of summarizing the cases, then, is to say that the party won each time. But in some sense that begs the question. Who *is* the party? The Log Cabin Republicans, after all, were registered party members who wished to change the party from the inside. Both David Duke and the voters who supported him claimed to be Republicans, even if their views did not accord with the views of the Georgia party's current leadership.[54] And a majority of registered Democrats and registered Republicans—the party-in-the-electorate to borrow again from V.O. Key—voted in favor of the blanket primary initiative,[55] only to be thwarted by party officials chosen through dimly understood processes in which few party members had participated.

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45. *Id.* at 571.

46. *See* Duke v. Massey, 87 F.3d 1226 (11th Cir. 1996) (describing the relevant events).

47. *Id.* at 1228.

48. *Id.* at 1228–29.

49. *Id.* at 1229. Under Georgia law, the Secretary of State takes initial responsibility for listing candidates, and "each person designated by the Secretary of State as a presidential candidate shall appear upon the ballot of the appropriate political party . . . unless all committee members of the same political party or body as the candidate agree to delete such candidate's name from the ballot." GA. CODE. ANN. § 21-2-193 (2007).

50. *Duke*, 87 F.3d at 1229.

51. Republican Party v. Dietz, 940 S.W.2d 86, 88 (Tex. 1997).

52. Cal. Democratic Party v. Jones, 530 U.S. 567, 586 (2000).

53. *Duke*, 87 F.3d at 1228.

54. In fact, two of the three committee members—the senate and house minority leaders—while they had been chosen by the party's legislators were in no sense chosen by the party's membership, since they were elected solely by the voters living in their districts. And Georgia Republicans who lived in districts that elected Democrats were unable even to participate indirectly in selecting the Republican legislative leaders. *See Duke*, 87 F.3d at 1229.

55. *See Cal. Democratic Party*, 530 U.S. at 601 (Stevens, J., dissenting) (pointing to "the preference of almost 60% of California voters—including a majority of registered Democrats and Republicans—for a blanket primary"); Tashjian v. Republican Party, 479 U.S. 208, 236 (1986) (Scalia, J., dissenting) (arguing that states may permissibly intervene to "protect the general party membership against . . . minority control" by party officials).

In thinking about this who-is-the-party question, it may be instructive to consider a related question in the law of religion cases. When is the state in a position to referee a claim among competing factions as to "who is the Church?" A leading case on this question is *Serbian Eastern Orthodox Diocese v. Milivojevich (Serbian Bishops)*.[56] After he was deposed and defrocked by the Mother Church in then-Yugoslavia (where politics have literally been balkanized, in contrast to the Supreme Court's hyperbolic use of the term to refer to the creation of majority-black congressional districts in North Carolina),[57] the respondent brought suit in state court, challenging the church's actions as procedurally and substantively defective under its own internal rules; in turn, the church sought control over various property and assets.[58]

The Illinois Supreme Court held that the bishop's treatment was arbitrary under its reading of the Mother Church's "constitution and penal code" and that the diocesan reorganization was invalid under its view of the constitutional relationship between the Mother Church and the Diocese, but the U.S. Supreme Court reversed.[59] In an opinion by Justice Brennan, the Court held that it would violate the Free Exercise Clause for civil courts "to probe deeply enough into the allocation of power within a [hierarchical] church so as to decide religious law" in much the same manner as it would violate the clause for courts to engage in "civil determination of religious doctrine."[60] Nor should the legislature be permitted to intrude in internal church governance "for the benefit of one segment."[61] The state simply should not intervene to resolve internecine disputes over what is the true church and who are its leaders and members. It cannot take sides in doctrinal disputes because "religious freedom encompasses the 'power [of religious bodies] to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'"[62] In short, the *Serbian Bishops* case rejected "intrusion into a religious thicket"[63] as incompatible with judicial neutrality.[64]

In dissent, then-Justice Rehnquist pointed out that the case was not simply a dispute over internal church doctrine—that is, over what adherents to Serbian Orthodoxy should believe.[65] Rather, it was a dispute over tangible assets, including real property,

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56. 426 U.S. 696 (1976).

57. *See* Shaw v. Reno, 509 U.S. 630, 657 (1993) (claiming that deliberately creating majority nonwhite districts "may balkanize us into competing racial factions").

58. *Serbian Bishops*, 426 U.S. at 706–08.

59. Serbian E. Orthodox Diocese v. Milivojevich, 328 N.E.2d 268 (Ill. 1975), *rev'd*, 426 U.S. 696 (1976).

60. *Serbian Bishops*, 426 U.S. at 709.

61. Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 121 (1952) (striking down a New York statute that had awarded control over the New York property of the Russian Orthodox church to an American group on the grounds that the patriarchate in Russia had become "a tool of the Soviet Government").

62. *Serbian Bishops*, 426 U.S. at 721–22 (quoting *Kedroff*, 344 U.S. at 116) (alteration in original).

63. *Id.* at 719.

64. One way to think about the Court's holding is to see it as involving a full faith and credit principle in which church authorities' decisions in internal church processes are treated as dispositive in later civil litigation.

65. *Serbian Bishops*, 426 U.S. at 726 (Rehnquist, J., dissenting).

located within the State of Illinois.[66] Both sides had invoked the jurisdiction of the state courts—the Bishop to regain his See (and therefore his control over the church's assets within the state) and the church itself to establish its control over the assets.[67] Given this posture, courts should be "entitled to ask if the real Bishop of the American-Canadian Diocese would please stand up."[68] Otherwise, they would be forced to rely on a formality—"ecclesiastical paper title."[69] Indeed, even the *Serbian Bishops* majority left open the possibility of "marginal civil court review" in cases when churches "act in bad faith for secular purposes."[70] The majority just disagreed that the property dispute was such a case, given the Church's own construction of its internal rules.[71]

What does the *Serbian Bishops* case tell us? On the one hand, if religious associations are to control their own message—their doctrine—the government cannot step in to take sides in an internal struggle over a church's identity. The Serbian Orthodox Church itself was the product of schism; perhaps if dissidents disagree over a church's course, they should leave and found their own association. At the same time, complete state nonintervention is troubling for the reasons raised by Justice Rehnquist's dissent: when the church participates in the secular world, it is in a different position than when it is dealing entirely with matters of dogma.

Thinking about the political party cases in light of *Serbian Bishops* highlights a similar difficulty in deciding whether to respect a political party's assertion of autonomy from state control. What makes the political party cases tricky is precisely the difficulty in drawing a line between a party's internal and public activities. In the arena of religion, free exercise claims start from a baseline of no state regulation and no state benefits: the Serbian Orthodox Church operated completely free of the state. Thus, free exercise is a negative liberty: the government is not obligated to assist affirmatively individuals or religious organizations—the church whose members cannot afford a building cannot call on the government to construct one; the believers whose religion demands a pilgrimage to a holy place cannot demand government-provided transportation to get there; the adherent whose religion commands her to be fruitful and multiply cannot call on the government to provide fertility treatments. By contrast, at least when it comes to parties' selection of candidates for public office, the baseline is not state noninvolvement—at least not if the state, as all states do today, regulates the nomination processes and conditions the benefit of ballot access on compliance with those regulations. As a result, parties' claims to noninterference differ in a significant respect from churches' claims to noninterference in the selection of their standard bearers.

In conducting primaries that entitle their candidates to preferential ballot access, parties have invoked the jurisdiction of the state and received a substantial benefit. Indeed, it is impossible to separate the party from the state, since it is the party-in-government that has crafted the ballot access laws. Moreover, in most states, redistricting is performed by elected officials—again, the party-in-government—who

66. *Id.*
67. *Id.*
68. *Id*.
69. *Id.*
70. *Id.* at 713 (internal quotation marks omitted).
71. *Id.* at 713–14.

craft districts designed to elect their adherents. Thus, "free exercise" cannot describe what political parties are engaged in, at least insofar as they seek to exclude voters from participating in their primaries, a "'crucial juncture'" in the electoral process.[72] Unlike other blocs of like-minded citizens, parties have agreed to perform a public function integral to the electoral process: winnowing down the number of candidates on the ballot in the general election to a manageable handful. That is why the Supreme Court treated the Democratic Party as a state actor in *Smith v. Allwright* and rejected the claim that the party's First Amendment associational rights permitted it to exclude black voters.[73]

Although the concept of free exercise as protection from state interference with a party's internal affairs thus cannot be directly translated into the electoral context, it does have some traction when it comes to internal party governance. Seen through the lens of *Serbian Bishops*, the outcome of the Log Cabin Republican case makes a fair amount of sense. A party's decisions about its message have to be free from state interference. A party's platform is its statement of faith, its dogma. Individuals are free to adhere to the platform or not, but the platform is entirely an internal matter of party governance and must be protected from state intervention. Indeed, the Supreme Court took a similar position in *Eu v. San Francisco County Democratic Central Committee*, when it struck down a California statute that dictated the internal structure of parties' governing bodies as a violation of their freedom of association.[74]

*Duke v. Massey*[75] is a more complicated case because there the functions of expressing the party's message and selecting the party's standard-bearer are firmly linked. The very purpose of a primary election, after all, is to allow the party-in-the-electorate to select the party's candidate. It undermines the primary election to have party officials partially decide the outcome by eliminating candidates ahead of time on the grounds of inauthenticity.

Finally, *California Democratic Party v. Jones* and other cases involving participation in parties' primaries[76] raise yet another set of questions, especially when blanket- or open-primary laws are adopted through popular initiatives in which large numbers of party members participate and a majority supports such laws. To say that "the party" has a First Amendment entitlement to exclude nonmembers from participating in its nominating events surely makes sense. But if the party's members and its leadership disagree, that disagreement can be resolved in favor of party leaders' views only by deciding implicitly that the party's internal processes for resolving disputes give this power to the leadership.

In the end, the special constitutional status of religious groups under the Religion Clauses and political parties is clearly doing significant work. It is hard to imagine, for example, that the Supreme Court would have decided *Eu* the same way had it involved a different sort of nonprofit or corporation: almost certainly, California could have required other corporations doing business within the state to elect their boards using

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72. Cal. Democratic Party v. Jones, 530 U.S. 567, 575 (2000) (quoting Tashjian v. Republican Party, 479 U.S. 208, 216 (1986)).

73. 321 U.S. 649 (1944).

74. 489 U.S. 214 (1989).

75. 87 F.3d 1226 (11th Cir. 1996).

76. *See, e.g.,* Clingman v. Beaver, 544 U.S. 581 (2005); Wash. State Republican Party v. Washington, 460 F.3d 1108 (9th Cir. 2006), *cert. granted*, 127 S.Ct. 1373 (2007).

particular procedures or to rotate their chairmanships among different constituencies. Thus, it may be precisely because constitutional protection of political parties' and churches' processes of formulating their messages is so important that they are accorded special autonomy.

## III. KIRYAS JOEL AND CURIOUS DISTRICTS

As we saw in the preceding section, party governance cases become difficult to view through a free exercise lens when they involve the party's public function of conducting primary elections that are "an integral part of the election machinery."[77] It makes little sense to talk about preventing state interference when the party is performing a public function, and receiving an important public benefit—preferential ballot access—for doing so. At that point, anti-establishment seems a more appropriate perspective.

This is particularly true given a central fact about American elections: a significant number are decided not on the Tuesday after the first Monday in November, but in party primaries. A critical reason for this phenomenon is the pervasive use of electoral districts.

In recent years, the Supreme Court has faced a substantial number of constitutional and statutory challenges to the configurations of legislative districts. In *Shaw v. Reno*[78] and its progeny, the Court ratcheted up the level of judicial oversight over the deliberate creation of majority nonwhite legislative districts, holding that when race is the "predominant" factor explaining a district's configuration, the district can survive only if it is narrowly tailored to comply with the Voting Rights Act's commands that redistricting neither diminish nor dilute minority voting strength.[79] In *Vieth v. Jubelirer*[80] and its progeny, the Court abandoned, at least for now, any real judicial oversight regarding partisan gerrymandering.

It is easy—too easy in fact—to draw analogies between the *Shaw* cases and the Court's Establishment Clause jurisprudence. First, consider the threshold question of standing. In most areas of the law, plaintiffs must show a concrete, particularized injury in order to invoke the federal court's jurisdiction. A "shared individuated right to a Government that obeys the Constitution"[81] or "a generally available grievance about government"[82] generally does not confer standing. The primary exception is in Establishment Clause cases, where *Flast v. Cohen*[83] recognized taxpayer standing: any taxpayer can challenge government expenditures that allegedly violate the First Amendment without showing that he suffered any injury "which sets him apart from the citizenry at large."[84]

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77. United States v. Classic, 313 U.S. 299, 318 (1941).

78. 509 U.S. 630 (1993).

79. *See generally* ISSACHAROFF ET AL., *supra* note 28, at 724–60 (discussing the *Shaw* cases at length).

80. 541 U.S. 267 (2004).

81. Allen v. Wright, 468 U.S. 737, 754 (1984) (citation and internal quotation marks omitted).

82. Lujan v. Defenders of Wildlife, 504 U.S. 555, 573 (1992).

83. 392 U.S. 83 (1968).

84. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 881–82 (1983). *Flast* was significantly limited by the Court's recent decision in *Hein v. Freedom From Religion Found.*, 127 S. Ct. 2553 (2007)

Similarly, the relaxed nature of *Shaw* standing requires only that the plaintiff be a resident of the majority-nonwhite district she seeks to challenge. The Court does not require that *Shaw* plaintiffs be white.[85] It does not require that *Shaw* plaintiffs allege that their votes have been diluted. It does not require that *Shaw* plaintiffs allege that they are deprived of adequate or equal post-electoral representation because of their race. In fact, it requires no tangible voting-related injury at all, but only residence within the district and an objection to the role that race played in the government's decision on where to draw the lines.

Second, consider the nature of the harm at issue. In Establishment Clause cases involving holiday displays and prayers at public school events, the Court has pointed to the message sent by the government action. Government-sponsored prayer "conveys a message of exclusion to all those who do not adhere to the favored beliefs,"[86] telling "nonadherents 'that they are outsiders, not full members of the *political* community,' and . . . adherents that they are insiders, favored members of the *political* community."[87]

So, too, the Court has suggested, with *Shaw* cases:

> The message that [race-conscious] districting sends to elected representatives is equally pernicious. When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole.[88]

This is why Rick Pildes has described the *Shaw* cases as involving "expressive harms."[89]

Third, consider how both the religious display cases and the *Shaw* cases share a concern with appearance that produces an ultimately unsatisfying fact-intensive jurisprudence. Compare two religious display cases involving crèches, *Lynch v. Donnelly*[90] and *County of Allegheny v. ACLU*.[91] The former crèche was permissible, the latter not. Why? Well, in *Lynch*, the city's holiday display also contained

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(holding that although *Flast* confers standing to challenge congressional appropriations in support of religion, it does not confer standing to challenge executive-branch programs funded by general appropriations).

85. In *Bush v. Vera*, 517 U.S. 952 (1996), the eponymous Al Vera, one of the plaintiffs challenging the majority-Hispanic House District 29, was himself Hispanic. *See* Brief of State Appellants on the Merits, Bush v. Vera, 517 U.S. 952 (Nos. 94-805, 94-806 & 94-988), 1995 U.S. S. Ct. Briefs LEXIS 438. The Court held that he had standing. *Vera*, 517 U.S. at 957. Moreover, in *Shaw* itself, the plaintiffs omitted their race from the complaint entirely. Shaw v. Reno, 509 U.S. 630, 638 (1993).

86. Lee v. Weisman, 505 U.S. 577, 606 (1992) (Blackmun, J., concurring).

87. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 309–10 (2000) (emphasis added) (citation omitted).

88. *Shaw*, 509 U.S. at 648.

89. Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts" and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483 (1993).

90. 465 U.S. 668 (1984).

91. 492 U.S. 573 (1989).

> a Santa Claus house with a live Santa distributing candy; reindeer pulling Santa's sleigh; a live 40-foot Christmas tree strung with lights; statues of carolers in old-fashioned dress; candy-striped poles; a "talking" wishing well; a large banner proclaiming "SEASONS GREETINGS"; a miniature "village" with several houses and a church; and various "cut-out" figures, including those of a clown, a dancing elephant, a robot, and a teddy bear.[92]

There was so much going on that the display "negate[d] any message of endorsement" of Christian beliefs that a crèche might otherwise suggest.[93] By contrast, in *County of Allegheny*, the display was more tasteful and therefore more communicative: the crèche, whose manger had at its crest an angel bearing a banner proclaiming "Gloria in Excelsis Deo," stood by itself on the Grand Staircase of the Allegheny County Courthouse, the "most beautiful" and "most public" space in the building.[94] It was flanked by just a "floral frame," which "serves only to draw one's attention to the message inside the frame. The floral decoration surrounding the crèche contributes to, rather than detracts from, the endorsement of religion conveyed by the crèche."[95]

The fact that the *Shaw* decisions virtually always included a set of maps along with the decisions show how these cases too involve an almost aesthetic concern.[96] In the *Shaw* cases, the Court began its analysis by declaring that "we believe that reapportionment is one area in which appearances do matter."[97] Ultimately, the Court moved away from a test focused entirely on district shape toward a predominant purpose test. As long as race did not predominate over such traditional principles as compactness, contiguity, respect for political subdivision boundaries, protection of incumbents, and partisan considerations, the district would not trigger strict scrutiny. In the North Carolina redistricting's final appearance before the Court, the Court downplayed the evidentiary significance of a statement by one of the plan's drafters that the plan "provides for a fair, geographic, racial and partisan balance throughout the State of North Carolina," concluding that the reference to "racial balance" showed only that the "legislature considered race, along with other partisan and geographic factors."[98] As long as race is metaphorically accompanied by a dancing elephant of partisanship—in the North Carolina case, actually a dancing donkey, since the

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92. *Allegheny*, 492 U.S. at 596 (citing Donnelly v. Lynch, 525 F. Supp. 1150, 1155 (D.R.I. 1981), *rev'd*, 465 U.S. 668 (1984)).

93. *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring). You can get almost the same result by comparing the Court's split-the-difference decisions in the Ten Commandments cases. *Compare* Van Orden v. Perry, 545 U.S. 677 (2005) (upholding Texas's inclusion of a Ten Commandments monument included among seventeen monuments and twenty-one historical markers on the state capitol grounds) *with* McCreary County v. ACLU, 545 U.S. 844 (2005) (striking down a Ten Commandments plaque initially mounted alone on a county courthouse's wall).

94. 492 U.S. at 579.

95. *Id.* at 599.

96. *See generally* Hampton Dellinger, Commentary, *Words Are Enough: The Troublesome Use of Photographs, Maps, and Other Images in Supreme Court Opinions*, 110 HARV. L. REV. 1704 (1997).

97. Shaw v. Reno, 509 U.S. 630, 647 (1993).

98. Easley v. Cromartie, 532 U.S. 234, 253 (2001).

challenged plan was crafted to aid Democrats—it sends no constitutionally troublesome message.[99]

For me, the striking thing about the Court's redistricting jurisprudence is how quick it has been to confront the creation of majority nonwhite districts as a sort of establishment of race, and how reluctant it has been to do anything about the far more pernicious "establishment of party" achieved by partisan line-drawing. The partisan gerrymandering cases are a far better illustration of the religious Establishment Clause concern that a sect will somehow gain control over the government machinery and extract subsidies from the public. The major parties, and not racial minorities, control the redistricting process, and they use it to insulate themselves from competition.

A richer understanding of the religion cases would actually reinforce the criticism of *Shaw*, for the *Shaw* principle suffers from the problem the Court identified in *Rosenberger v. Rector and Visitors of the University of Virginia*, a case involving the University of Virginia's policy of refusing to fund student publications that "primarily promote[] or manifest[] a particular belie[f] in or about a deity or an ultimate reality."[100] The university claimed that this policy did not constitute impermissible viewpoint discrimination and further defended its refusal to fund a magazine with an explicitly "Christian perspective" on the grounds that the denial was necessary to avoid an Establishment Clause violation.[101]

The Court rejected both arguments. With respect to the question whether the ban constituted viewpoint discrimination, the Court observed that religion provides "a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered."[102] The university's policy placed publications that adopted a religious perspective in a distinctively disadvantaged position vis-à-vis all other perspectives. And this disadvantage was not required by the Establishment Clause. To the contrary, all that was required was neutrality—that is, treating *Wide Awake: A*

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99. The parallels between the crèche cases and the *Shaw* cases involve methodology as well. *Shaw* presented a second-hand invocation of Justice Stewart's classic description of obscenity—"I know it when I see it." *Shaw*, 509 U.S. at 647 (quoting Karcher v. Daggett, 462 U.S. 725, 755 (1983) (Stevens, J., concurring) (quoting Jacobellis v. Ohio, 378 U.S. 184, 197 (1964))). This set the Court upon a roughly decade-long course of "Redrupping" congressional districts. ("Redrupping" refers to the Court's practice, in the late 1960s, after its decision in *Redrup v. New York*, 386 U.S. 767 (1967), of summarily deciding obscenity cases without issuing opinions setting out legal standards to govern future cases.) *See* Pamela S. Karlan, *Still Hazy After All These Years: Voting Rights in the Post* Shaw *Era*, 26 CUMB. L. REV. 287, 288 (1996) (discussing the *Shaw* cases). As Mary Anne Case observes:

> The Court has shifted its particularistic examination of individual cases in an area for which it has been unable to articulate a workable test of general applicability from the counting up of body parts and their distance from one another in dirty movies to the counting up of elves and candy canes and their distance from the creche in Establishment Clause cases involving use of public property for religious holiday displays; it also now scrutinizes individually the shape of voting rights districts as it used to scrutinize images on a screen.

Mary Anne Case, *Lessons for the Future of Affirmative Action from the Past of the Religion Clauses?*, 2000 SUP. CT. REV. 325, 353 n.114.

100. 515 U.S. 819, 823 (1995) (third alteration in original).

101. *Id.* at 827–28.

102. *Id*. at 831.

*Christian Perspective at the University of Virginia* the same way the university treated all other student publications.[103]

When we turn from questions of religion to issues of redistricting, we see a similar issue of whether it really is neutral to exclude a distinctive point of view connected with group membership. In politics, race is often a perspective around which voters organize themselves.[104] If racial groups share political preferences, a pluralist political system cannot categorically exclude them without sacrificing legitimacy. As the Supreme Court explained in *Hunter v. Erickson*, "the State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size."[105] An equal protection principle that treats voters who affiliate politically along racial lines differently from voters who affiliate along other shared characteristics imposes a kind of viewpoint discrimination that inverts the constitutional commitments of the Fourteenth and Fifteenth Amendments, limiting the political aspirations of precisely that group—black Americans—whom the amendments were originally intended to serve.[106]

Ironically, the Court *has* applied the Establishment Clause directly to the problem of districting, although only Justice Kennedy seems to have noticed the direct connection. *Kiryas Joel Village School District v. Grumet*[107] involved a challenge to a New York statute that created a new school district for the village of Kiryas Joel. The village itself was a somewhat singular creation: using a state law of general applicability, a community of Satmar Hasidim had managed to craft an entirely homogeneous jurisdiction.[108] The village did not need a conventional public school system, because the Hasidim wanted to send all their children to religious schools.[109] But the community had roughly a dozen students with special educational needs, and it did not want to send those children to the larger public school system in the surrounding community.[110] So it persuaded the state legislature to pass a special bill permitting the creation of a Kiryas Joel school district, whose full-time student body consisted of only forty students—twenty-seven of them Hasidim bused in from outside the village.[111]

In a fractured opinion, the Supreme Court held that the creation of the district violated the Establishment Clause. Justice Souter noted the irregular way in which the district had been created—condemning the "manipulation of the franchise for this

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103. *Id.* at 845.

104. *See generally* Pamela S. Karlan & Daryl J. Levinson, *Why Voting Is Different*, 84 CAL. L. REV. 1201, 1217–20 (1996).

105. 393 U.S. 385, 393 (1969).

106. Jim Blacksher developed this point in a particularly powerful and persuasive form, by comparing the underpinnings of the *Shaw* cases to assumptions underlying *Dred Scott v. Sandford*, 60 U.S. 393 (1857), and *Plessy v. Ferguson*, 168 U.S. 537 (1896). James U. Blacksher, *Dred Scott's Unwon Freedom: The Redistricting Cases as Badges of Slavery*, 39 HOW. L.J. 633 (1996).

107. 512 U.S. 687 (1994).

108. *Id.* at 691.

109. *Id.*

110. *Id.* at 692.

111. *Id.* at 694.

district."[112] Justice Kennedy's concurrence in the judgment went further, explicitly comparing the creation of a district along religious lines to the creation of the constitutionally impermissible districts in *Shaw*: "In this respect, the Establishment Clause mirrors the Equal Protection Clause."[113]

Justice Scalia's dissent, joined by Chief Justice Rehnquist and Justice Thomas, did not address Justice Kennedy's invocation of *Shaw* directly, but its defense of the Kiryas Joel school district stands in sharp contrast to those Justices' position in the *Shaw* cases. Justice Scalia was quite comfortable with the idea of an all-Hasidic school district, although he denied that the boundaries were *religious*: "On what basis," he asked, "does Justice Souter conclude that it is the theological distinctiveness rather than the cultural distinctiveness that was the basis for New York State's decision?"[114] But if the Hasidim can be viewed as a cultural group—a community of interest—rather than a religious (or even a racial[115]) group, then why shouldn't black or Latino voters be viewed similarly?[116] Echoing Justice O'Connor's statement in *Shaw* that "redistricting differs from other kinds of state decisionmaking in that the legislature always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors" and that "[t]hat sort of race consciousness does not lead inevitably to impermissible race discrimination,"[117] Justice Scalia suggested that the plaintiffs challenging Kiryas Joel should "have to show not only that legislators were aware that religion caused the problems addressed, but also that the legislature's proposed solution was motivated by a desire to disadvantage or benefit a religious group . . . *because of their religion*."[118]

So what should we make of the *Shaw* cases as "establishment of race" cases once we've looked at a *real* Establishment Clause case involving districting? The majority-nonwhite legislative districts at issue in the *Shaw* cases are less troubling than the Kiryas Joel school district—or the village of Kiryas Joel itself, for that matter—along a variety of dimensions. First, they were not racially homogeneous; it has struck me as beyond perverse for the Supreme Court to use phrases like "balkanization" and "political apartheid" to refer to some of the most racially integrated districts in the country.[119] Second, they were created in a process of general applicability in which minority voters used their political leverage in a fashion quite similar to the way all sorts of other groups "pulled, hauled, and traded" to attain their political goals.[120]

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112. *Id.* at 698 (opinion of Souter, J.).

113. *Id.* at 728 (Kennedy, J., concurring).

114. *Id.* at 740 (Scalia, J., dissenting).

115. *See* Shaare Tefila Congregation v. Cobb, 481 U.S. 615, 617–18 (1987) (holding that for purposes of a Reconstruction-era statute protecting individuals against racial discrimination that Jews count as a racial group).

116. Would the Justices who object to race-conscious redistricting that benefits black communities be mollified if the public discussion described those communities as comprising members of (overwhelmingly black) African Methodist Episcopal churches instead?

117. Shaw v. Reno, 509 U.S. 630, 646 (1993) (emphasis in original).

118. *Kiryas Joel*, 512 U.S. at 741 (emphasis in original).

119. *See* Pamela S. Karlan, *Our Separatism? Voting Rights as an American Nationalities Policy*, 1995 U. CHI. LEGAL F. 83, 92–93, 102–04 (discussing this issue).

120. Johnson v. DeGrandy, 512 U.S. 997, 1020 (1994).

Finally, the ultimate goal of race-conscious districting is political integration of the minority community in the legislative process, and not political separatism.

The real puzzle is why the Establishment Clause sensibility that seems to drive the Court in the *Shaw* cases and *Kiryas Joel* has been so absent in the political gerrymandering cases. Ironically, the cases have been so focused on the question of identifying a constitutionally grounded, judicially manageable standard for adjudicating whether seats are allocated fairly between the two major parties that the question whether the system ought to be protecting *both* parties' incumbents has been largely overlooked. The problem has been treated for so long as a kind of individual or group rights/free exercise-type claim that its Establishment Clause flavor has been missed. Rick Pildes recently noted that a central threat to democracy is the propensity of governing parties arranging the political structure to thwart future challenge.[121] As I've noted elsewhere, the American version of "'one man, one vote, one time' . . . is more subtle: we continue to have regularly scheduled elections, but elected officials from both major parties unite to ensure that the election results are foreordained."[122] A political system that ordains its representatives, whether that ordination is religious or entirely secular, is nonetheless troubling for many of the same reasons that a political system that religiously ordained representatives controlled would be.

## IV. VOUCHERS AND DOLLARS

Campaign finance is the area of the law of democracy that rests most explicitly on First Amendment concerns—largely freedom of speech, but recently also a renewed understanding of the implications for freedom of association. There's little need to add a free exercise gloss.

But as the appellants in *Buckley* long ago asserted, the Establishment Clause can provide a useful lens for thinking about one particular issue: the question of public financing. The current system of federal financing for presidential campaigns—which may be on the brink of practical extinction since every remotely realistic presidential candidate seems poised to forswear it[123]—seems only to have entrenched the existing parties, while doing little to reduce the impact of private money. It gives the two major parties millions of dollars to run their conventions and their general election campaigns, while relegating any other candidates to the potential for receiving funds retrospectively, if they manage to poll substantial numbers of votes. Despite the presence of public funds, private funds continue to flow in and around the public financing regime.[124]

The central problem with most public finance regimes is that the decision of how much money to give, and to whom, creates competing risks. On the one hand, it would be wasteful and pointless to give money to candidates who are unlikely to garner significant support even if they have the resources to inform voters about their

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121. Richard H. Pildes, *The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28 (2004).

122. Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 571–72 (2004).

123. *See* Eliza Newlin Carney, *The Death of Public Financing*, NAT'L J., June 16, 2007, at 34 (reporting on the decisions by leading candidates to opt out of the system).

124. *See* ISSACHAROFF ET AL., *supra* note 28, at 450–51.

positions. On the other hand, providing funds only to candidates from parties that have an established track record further cements those parties' already advantaged positions. Giving unto whomsoever much has already been given thus carries a real risk of political establishment.

Perhaps one group of Establishment Clause cases points to a possible solution. The Supreme Court has generally held that direct subsidies to religious institutions, such as parochial schools, violate the Establishment Clause. But in cases like *Witters v. Washington Department of Services for the Blind*[125] and *Zelman v. Simmons-Harris*,[126] the Court has distinguished programs in which private individuals, rather than the government, determine the distribution of funds.

*Witters*, for example, involved a state vocational rehabilitation assistance program that gave grants to individual visually disabled students to seek training in "the professions, business or trades";[127] the plaintiff sought funding to pursue his studies at a private Christian college where he was preparing for a career "as a pastor, missionary, or youth minister."[128] The state agency denied his request, and the state supreme court upheld the denial on the grounds that providing state financial assistance "to enable someone to become a pastor, missionary, or church youth director clearly has the primary effect of advancing religion" in violation of the Establishment Clause.[129] The U.S. Supreme Court unanimously reversed. Justice Marshall's opinion for the Court concluded that, to the extent that the funds were "paid directly to the student, who transmits [them] to the educational institution of his or her choice[, a]ny aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients."[130] Since Washington's statutory scheme was neutral, and "in no way skewed towards religion," the Court refused to characterize it as "one of the ingenious plans for channeling state aid to sectarian schools that periodically reach this Court" only to run afoul of the Establishment Clause.[131] The Court went even further in *Zelman*, which involved an Ohio program that gave tuition assistance grants to parents in Cleveland to be used at any participating public or private school of the parents' choosing.[132] Although ninety-six percent of the students who used the vouchers attended parochial schools, the Court still upheld the program, finding that "government aid reaches religious schools only as a result of the genuine and independent choices of private individuals."[133]

Some state- and local-level public financing schemes use a version of this technique, providing public funds to candidates on the basis of the candidates having demonstrated public support through raising small contributions from a wide donor base. Or consider Bruce Ackerman and Ian Ayres' ambitious proposal for a federal public financing regime using "Patriot dollars"—in which each voter would be given a

125. 474 U.S. 481 (1986).
126. 536 U.S. 639 (2002).
127. *Witters*, 474 U.S. at 483.
128. *Id.*
129. Witters v. Comm'n for the Blind, 689 P.2d 53, 56 (Wash. 1984) (quoting Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971)), *rev'd*, 474 U.S. 481 (1986).
130. *Witters*, 474 U.S. at 487.
131. *Id.* at 488 (internal quotation marks omitted).
132. Zelman v. Simmons-Harris, 536 U.S. 639, 645 (2002).
133. *Id.* at 649.

voucher for $50 (of which $10 would be allocated to House races, $15 to Senate races, and $25 to the presidential election) that could be contributed to candidates, political parties, or political activity committees.[134] One signal virtue of such plans is that they leave to individual choice, rather than government decision making, the allocation of funds, and the Ackerman-Ayres proposal in particular recognizes that many voters will choose to rely on intermediaries to direct their funds.[135] To the extent that the voters, rather than the parties-in-government, determine the amount and distribution of funds, public financing systems raise fewer problems of entrenchment or establishment. Of course, many such regimes do not eliminate the need for private money altogether, since the private money serves as the triggering condition for receiving public money. But the continued reliance on some level of private funding may be the lesser of two evils.

## CONCLUSION

In the *Poetics*, Aristotle tells us that "the greatest thing by far is to be a master of metaphor . . . since a good metaphor implies an intuitive perception of the similarity in dissimilars."[136] I wouldn't go quite that far: it's got to be greater to be Roger Federer or Helen Mirren or Robert Pinsky. But looking at problems in the law of politics as if they were problems under the religion clauses can help us to sharpen our focus, and to see why, to use the metaphor one last time, establishment concerns are every bit as critical as free exercise ones in crafting constitutional rules to govern democratic politics.

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134. *See* BRUCE ACKERMAN & IAN AYRES, VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE (2002); Edward B. Foley, *Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance*, 94 COLUM. L. REV. 1204 (1994) (making a similar proposal). I offer a more extensive review and critique of the Ackerman and Ayres proposal in Pamela S. Karlan, *Elections and Change Under Voting with Dollars*, 91 CAL. L. REV. 705 (2003).

135. For further discussion of the importance of reliance on intermediaries, see Pamela S. Karlan, *New Beginnings and Dead Ends in the Law of Democracy*, 68 OHIO ST. L.J. 743, 752–53 (2007) (discussing the Supreme Court's recognition of this point in *Randall v. Sorrell*, 126 S.Ct. 2479 (2006)).

136. ARISTOTLE, POETICS 1459a (Ingram Bywater trans., Harvard Univ. Press 1926).